***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLANT

ORIGINAL

# 76-1129

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P/S

## United States Court of Appeals
## For the Second Circuit

UNITED STATES OF AMERICA,

*Appellee,*

v.

CHARLES INDIVIGLIA,

*Appellant.*

# APPELLANT'S BRIEF



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BRIEF FOR THE APPELLANT
CHARLES INDIVIGLIA:

PRELIMINARY STATEMENT:

This is an appeal undertaken in behalf of CHARLES INDIVIGLIA from a judgment of conviction of the United States District Court, Southern District of New York (U.S.D.J. Lasker) and a jury for the crimes of conspiring to violate 21 U.S.C. 812, 841(a)(1) and 841 (6)(1)(A), making it an offense to distribute and possess with intent to distribute narcotics, under 21 U.S.C. 844 (first count of the indictment) and the illegal distribution of and possessing with an intent to distribute narcotics, in violation of 21 U.S.C. 812, 841(a)(1) and 841 (b)(1)(A).

As a consequence, the appellant CHARLES INDIVIGLIA was sentenced as follows: under the first count of the indictment, charging conspiracy, a sentence of five (5) years to be followed by a six (6) year period of special parole and additionally, under the second count of the indictment, a suspended sentence, the defendant to serve a five (5) year probation term in lieu thereof, pursuant to 28 U.S.C. 4208(a)(2), said period of probation to commence as of the time of the imposition of sentence.

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW:

1. Was there a prejudicial variance committed when the evidence indicated multiple conspiracies, the indictment charging an overall conspiracy, and should the Court have granted the appellant CHARLES INDIVIGLIA a severance by reason thereof, the Court having granted a severance to a co-defendant who was circumstanced similarly to the appellant?

2. Did the summation of the prosecution exceed the limits of fair comment?

STATEMENT OF THE CASE AGAINST THE APPELLANT CHARLES INDIVIGLIA:

The Government's case against CHARLES INDIVIGLIA was based principally on two witnesses, one Albert Rossi and Peter Mengrone. The Government's case commenced with the testimony of Mr. Rossi. Rossi's criminal and sordid background was initially brought out by the Government attorney during direct examination (A1-A18)*.

Rossi testified that he entered the narcotics business after meeting a co-defendant named Angelo Ricco and his brother Anthony Ricco. After identifying the defendants at trial, Rossi testified that he owed Anthony Ricco $5,000 (A19-A24). Unable to repay this sum he arranged to pay it off in $25.00 weekly installments which he didn't make (A26, A27). In October or November of 1971 he met Angelo and Anthony Ricco at the Rosedale Social Club, Rossi giving its location as being across the street from a bar called the Garden of Roses (A26, A27).

Rossi offered to repay the loan from the proceeds of proposed narcotic sales, provided he was supplied with the narcotics from the Riccos, (A28). The Riccos agreed to this new arrangement (A28, A29). At that time Rossi worked for the Thruway Taxi Co. where he met a co-defendant Freddie Blase. He told Blase that he had a narcotic source (A30). He later met Angelo Ricco who told him he would later give him an "ounce" (A32). At a subsequent meeting attended by Rossi, Blase and Angelo Ricco in

*( )This refers to the pagination of the Appendix furnished by the Appellant CHARLES INDIVIGLIA.

in October or November of 1971 at a bar called the "Chester House" in the Bronx, Angelo Ricco transferred an ounce of heroin to him for a price ranging from $700 to $800 to be paid in a week thereafter (A32, A33). Rossi then made possible arrangements with others for the resale of this drug (A36, A37).

He was successful in reselling the heroin for $1500 and he paid the original cost to Angelo Ricco dividing the remainder with Blase (A38, A39). Rossi then received another ounce from Angelo Ricco of narcotics (A38, A39). This was resold to a Robert Mentesti and the profit divided with Blase after paying Angelo Ricco the original price (A41). He related three or four more transactions with Angelo Ricco (A41). He also recounted resales to Corrado and Mentesti (A43).

Working with Blase, Rossi made $1500 weekly (A45). At this stage he explained this his partnership included Anthony and Peter Criscenti (A45). The time span of the transfers from Angelo and Anthony Ricco was between December 1971 to July 1972 (A46). The transactions were sporadic (A47, A49). Rossi claimed that the Riccos were the persons who arranged deliveries of narcotics to him (A49).

Rossi further testified that as to deliveries he spoke to Angelo Ricco and "sometimes Indiviglia" (A51). At "some" of the meetings with Ricco the appellant INDIVIGLIA was present (A51, A52).

According to Rossi, INDIVIGLIA made deliveries of narcotics to him and Blase in a restaurant they operated (A53). He fixed the time in March 1972 as one occasion (A53).

Rossi further related that he and Blase were at this restaurant and that the defendant Angelo Ricco and another person appeared. That the appellant went to the men's room and shortly thereafter rejoined them, telling Rossi that he put two ounces of a narcotic in a garbage pail (A54).

Rossi and Blase operated this restaurant from October 1971 to December 1972.

Upon meeting Anthony Ricco, Indiviglia was with him at the "club" (A55). During this time Rossi paid Anthony Ricco (A56).

In April 1972 Rossi left New York and went to Miami with Blase, the Criscentis and Corrado (A56, A58, A59, A95). The following July of 1972 Rossi left New York with Blase and a Robert Browning going to Puerto Rico (A60, A61). There he met the co-defendant James Rizzieri (A62, A63). Rizzieri spoke to Rossi about the narcotic business and ultimately became his partner replacing Blase who dropped out (A63, A64).

Upon returning to New York Rossi met the Riccos at the "club" (A65). He was asked whether anyone else was present and Rossi replied "I think so yes", naming the appellant (A66). This was stricken out (A66). He fixed the time as being July or August of 1972 (A67). Rossi then corrected himself and testified he met

with the Riccos and not the appellant (A68).

At this meeting Rossi told the Riccos that Blase was no longer working with them and that Rizzieri replaced him (A68). He asked the Riccos to supply him with greater quantities of narcotics (A68). Rossi's outlet at this phase was one Mentesti and according to Rossi one of the Riccos asked him whether one Sally Larka was a partner with Mentesti and whether Larka knew that the Riccos were the source of the narcotics (A71). Rossi also told one of the Riccos that he was going to get rid of his other partners, the Criscentis who were "leeches" and that Blase was no longer his partner (A63).

Rossi next explained the continuing phase of his operation with Rizzieri who supplanted his former business associates (A74). In the early part of August 1972 he met with the Riccos, the appellant being present (A74). At this meeting Rossi discussed supplies with t e Riccos (A75). However the appellant said nothing (A76). Rossi originally told them that deliveries would be made by "Tony" from Castle Hill Avenue (A76, A77). Later "Tony" made a delivery to him (A77). Rossi then told the jury about a sale to "Pete the Weep" (A79).

After introducing Rizzieri to the Riccos, the Riccos continued to supply the narcotics. Rossi then named his outlets (A80).

The Riccos according to Rossi, were supplying him with narcotics from the period August 1972 to December 1972 in the area of the "club", the "Magic Carpet", and to the best of his recollection had a clothing store designated as "Renzo Originals" (A83). In regard to the "Magic Carpet" this was a bar and

deliveries were made to him outside that place (A84). The Riccos spoke to Rossi about the deliveries at the Rosedale Social Club and the Magic Carpet. The appellant, INDIVIGLIA, was present as was Rizzieri (A85). Rossi claimed that these transactions involved $200,000 and after paying the Riccos their price he divided the profit or the remainder of the money with Rizzieri (A86). Rossi specified that the payments to Ricco were made in an establishment called Reeves Industries where the Riccos and the appellant's brother worked (A87).

In the middle of August 1972 Rossi and Rizzieri went to the "Club" where they saw Angelo Ricco. Angelo Ricco offered him a kilo of cocaine at a price of $14,000 to $16,000 (A88, A89).** Rossi accepted and made the purchase for Mentesti, one of his customers (A39, A90). The delivery to Rossi was made outside the club in the following way (A91). Rossi and Rizzieri went to their car, parked nearby, and Angelo Ricco procured the narcotics and the appellant "to the best of his recollection" handed it to [illegible] (A92). Rossi was unable to remember who owned the car (A92). In a further effort, Rossi then testified that Angelo Ricco and the appellant gave him the narcotics at that time and place (A95).

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**( )This refers to the substantive count of the indictment involving the appellant, count two.

It will be recalled that Rossi testified that Mentesti was a purchaser from him. According to Rossi, Mentesti complained of the poor quality of the narcotics and told Rossi to return it (A97). Rossi then arranged to meet Angelo Ricco and the appellant (A96, A97). He thereafter met Rizzieri, Angelo Ricco and the appellant and complained to them of the quality of the narcotics previously transferred to him allegedly. The appellant offered to reduce the price but Rossi rejected this, and insisted upon returning the narcotics (A98).

Rossi also testified that "he found out" that the particular narcotics involved in this transaction belonged to the appellant (A99). That the appellant gave him samples of narcotics from August 1972 to December 1972 (A100). However he also admitted he never fully transacted with the appellant (A100).

Thereupon, the relationship between Rizzieri and Rossi deteriorated and he testified they were having disagreements. He was also complaining to the Riccos about the quality of narcotics they allegedly were transferring to him (A101, A109-A117). As to these transactions, Rossi gave a lurid account of dealing with others, including one Herbie Sperling and Sperling's partner Gold, who it is believed were before this Court previously in other appeals. He told of having to take back the narcotics from his customers even though the buyers were willing to pay and arming himself with lethal weapons to reduce the taking of money left with him by the buyers and that the Riccos, refusing to rescind transactions, left Rossi liable for a cost ranging between $26,000 to $28,000 (A110, A114-A118, A123, A124).

The following January (1973) Rossi ceased transacting with the Riccos (A125). However in February 1973 he paid Angelo Rico one-half the price of the prior transaction previously described, giving him approximately $13,000 (A126, A127). However he continued transacting with other individuals not involved in this case (A128).

On cross examination Rossi related that he was a cocaine user and in response to questioning as to whether he used narcotics five or six times daily he answered "he could have" (A132). Further that he asked Anthony Ricco for help when he was involved in criminal actions and this help was refused (A134). He also testified at a prior trial that prior to March 1973 the extent of his narcotics dealing was "small weight", that is he dealt in quantities limited to 2 or 3 ounces (A138). He admitted that narcotic transactions were secret but his trial testimony was that he and Anthony Ricco passed cocaine through an automobile parked in front of the "club" in daylight (A141, A92, A95).

In August 1972 Rossi trafficked cocaine and once prior to that in March 1972 he also trafficked in cocaine (A147). Further that in August 1972 cocaine given to him by the appellant were samples, (A149). When he was interviewed by the authorities about his narcotic trafficking, he would tell them about the people he was transacting with (A150). Asked about the events in August 1972 that the appellant was allegedly involved in and whether he informed on the appellant, Rossi couldn't "recall" (A151, A152). Further cross examined as to his cooperation with

the authorities, he testified that he began his cooperation in March 1974. He was then confronted with Defendant's A for identification, which related to his narcotic activities (A153, A154). He was also confronted with the Defendant's B for identification, Government's 3501-35 for identification (A157, A158). He was also confronted with Government's 3501-25 for identification (A166); this was dated April 8, 1975 (A160). Again Rossi couldn't recall what, if anything, he told the authorities as to a delivery to him at the restaurant as he previously testified to on direct examination (A53, A163).

Further pressed as to Government's 3501-26 for identification and Defendant's D for identification, Rossi couldn't "recall" whether he told the agents up to the recent period of April 1975, that he dealt with the appellant (A165).

When interviewed by the agents they questioned him about those he dealt with however (A166).

Ultimately he was asked whether up to May 31, 1974 he ever mentioned the appellant as a source of narcotics and Rossi replied "I could have" (A169).

On August 8, 1974 when interviewed by the authorities, he couldn't remember whether he referred to the appellant (A172). Nor did Rossi remember whether on August 14, 1974 at another interview by the authorities he ever told he had a narcotic transaction with the appellant (A175).

Rossi at a later interview by the authorities, told the agents of the people he was "associated" with. However at trial he couldn't remember whether he referred to the appellant (A175, A177, Defendant's F-3 for identification).

When questioned as to whether Rossi ever told the agents of any transactions involving the appellant during the times he was cooperating, Rossi responded that he didn't know (A178, A179).

On August 20, 1974 Rossi appeared before Judge Carter, United States District Court, Southern District of New York (A180, Government's 3501-10, page 2, lines 6-22 for identification, Defendant's Exhibit H in evidence). This disclosed that Rossi told the Court that he didn't "touch" narcotics until January 1973 when he met one Coralluzzo (A181). He further told the Court at that session that he did not deal in cocaine then as he was a heroin dealer (A182). It may be recalled that the transaction he testified about in August 1972 where he involved the appellant, involved cocaine.

Before a grand jury four (4) months later, he testified that the appellant gave him a sample of cocaine for testing (A183, A184). It will be recalled that Rossi told the trial jury in this case that in August 1972 the appellant gave him cocaine (A184). But before the grand jury, he testified he didn't know who gave him cocaine because Ricco and the appellant had it and he "assumed" it was the appellant (A185). He also previously testified that he "assumed" that Ricco and the appellant were partners (A185).

He explained his trial testimony in the context of the former omissions by saying he "gave it more thought" (A187). On further cross examination he admitted a change in his testimony by stating that the appellant told him that the cocaine was his (A189). Thus in his grand jury testimony he never testified as to the ownership of the cocaine (A190). Further cross examination revealed that Rossi suffered brain damage as the result of an assault by an inmate while he was in jail (A207). He also had a history of psychological problems (A207, A208).

On re-cross examination Rossi couldn't recall whether he ever told the U.S. Attorney about the delivery of the samples at the restaurant he was operating (A254). Nor could he recall whether he ever told the authorities prior to trial about the incidents involving the appellant (A259). That parts of his testimony involving the appellant were never previously related to the grand jury (A261).

Donald Ferrarone, a government agent, next testified for the prosecution, (A264). On November 22, 1972 he arranged for a purchase of heroin from Angiolillo (A265). At a previously arranged meeting, this witness gave $18,000 to Angiolillo who was in a car, the driver being the co-defendant Rizzieri (A266). On February 5, 1973 he met Rossi. On February 8, 1973 he transacted for a transfer of heroin with Rizzieri (A269). On March 13, 1973 he met Rizzieri (A270, A271). Rizzieri told the agent that he had difficulties with his source; that one of his sources dried out and that he had to deal with others, and that

he had a source in Long Island. Ultimately, Rizzieri was arrested for a sale of narcotics in Queens (A272-A274).

On cross examination Ferrarone admitted that Angiolillo told him that as to the February sale, Rizzieri went to Long Island for the supply (A275). Ferrarone admitted that one Donovan told him that Rizzieri and Jimmy Cimino and Eddie Castellano, also supplied him with drugs as well as the Riccos (A276-A278).

On March 13, 1973, the night before Rizzieri's arrest, Rizzieri responded to the witness' complaint about the quality of the narcotics Rizzieri was supplying him with. Rizzieri told him the source was "drying up" or "dried up" (A278). Further, Rizzieri told the agent that he had to go to other sources, that he had to go to Long Island for supplies (A278, A279).

Gary Pearson, also testified (A280). He met the co-defendant John DiSalvo in 1969 and became friendly with him in December of 1971 (A281, A282). In April 1973 he accompanied DiSalvo and two others named Roy and Larry to New Jersey to make a sale to others (A282, A283). In New Jersey at the appointed spot, DiSalvo became suspicious and left the immediate area (A284, A285). In May 1973 Pearson met DiSalvo, who was accompanied by one Jerry Rubin. Rubin spoke to DiSalvo but the witness didn't hear the conversation (A287). However following that conversation DiSalvo told Pearson that Rubin wanted DiSalvo to supply him with an eighth of a kilo of heroin (A288). DiSalvo told the witness that

he could supply it (A288). Ultimately a sale was made to Rubin by this witness who gave it to Rubin (A290). A few weeks later DiSalvo told Pearson that he made another sale to Rubin giving Pearson a payment (A290, A291). Later this witness met Peter Mengrone (an unindicted co-conspirator) in Mount Vernon, the time being May 1973 (A291, A292). Mengrone asked Pearson for a supply of cocaine (A292). Pearson told this to DiSalvo (A293). This time DiSalvo said he would see whether Rubin would supply it (A293). Upon meeting Rubin the quantity to be acquired and the price were discussed (A297, A298). Pearson related these terms to Mengrone (A298). Later Pearson and DiSalvo went to the "Magic Carpet" (A298). At that place the witness left DiSalvo at the bar and spoke to Mengrone privately (A298). He asked Mengrone whether he had the price and Mengrone told him he was waiting for the money (A299). The witness related this to DiSalvo (A300). It next developed that the money was never given to Mengrone. It appeared that one "Nick" was with Rubin, who it will be recalled was the supplier in this transaction. As the witness described it, Mengrone was to give the witness the monry to bring to Rubin who in turn was to give the money to Nick, who was to give it to Mengrone. This was described as a "circular" transaction (A300). This witness dissolved his relationship with DiSalvo in June 1973 (A301). Later he received a shipment of cocaine from Florida in September 1973 (A301). He spoke to Angelo Ricco at Renzo's and gave him a sample (A302, A303). He attempted to sell this cocaine to Ricco but failed (A303).

In October 1973 Pearson met one Louis Guerra who wanted to buy an eighth of a kilo of heroin from him (A304, A305). Pearson spoke to DiSalvo about this transaction (A305 . He gave DiSalvo a down payment and ultimately procured the narcotics (A307). He gave a portion of these narcotics to Louis Guerra and another person (A307).

An agent named Gerbino next testified for the Government (A309). His testimony reached the visit to New Jersey by DiSalvo and Pearson who previously testified (A310-A313). There he met one DeJesus and another person. This agent told them that he had $36,500 to make a purchase of narcotics (A312). DeJesus being apprehensive moved the site of the proposed transaction to another place, a restaurant (A313). On this occasion, Gerbino saw DiSalvo in the area, who was observing him (A314). DeJesus also displayed a gun to this witness telling him that it was necessary for the "business" (A314). Later two men came to the scene of the meeting, a diner (A315). One of the men named "John" joined this witness and the others and said he was the "boss" (A316). Gerbino identified "John" as DiSalvo (A316, A317). DiSalvo threatened to kill Gerbino if it were ascertained he was an agent. This occurred on Good Friday (A318). Nevertheless the transaction was aborted because DiSalvo was apprehensive (A319, A320). Instead they later met in the Bronx, pursuant to an arrangement (A319, A320). In the Bronx, DiSalvo told the agent that he was ready to do business and to supply as much narcotics as the witness wanted (A320).

Peter Mengrone next testified for the Government (A324). This witness' background consisted of a college degree, government service, service for other government agencies, and a two year attendance at law school (A324, A326). In April 1974 Mengrone pled guilty in a New York State Court to a narcotic offense (A326). He was arrested on the charges involved in this indictment October 25, 1973. He began his cooperation with the authorities October 1974 (A327). For the period of October 1971 to September 1972 he worked at a bar called the "Four Winds" (A328). He then identified Angelo Ricco, Rizzieri, DiSalvo and the appellant at the trial (A328, A330). He knew Anthony Ricco (A332). While working at the Four Winds he frequently saw Rossi and Angelo Ricco (A332, A333). However while working there he didn't know the appellant INDIVIGLIO (A335). After leaving the Four Winds he bought the "Magic Carpet", a lounge in the Bronx (A336). He simultaneculy worked at Empire Ford, a Ford dealer (A337). He operated the Magic Carpet from September 1972 to June 1973 (A337). Anthony Ricco patronized that bar and came there with the appellant two or three times weekly (A338, A339). Rossi and Rizzieri also frequently came to that bar (A340). There they met Angelo Ricco and the appellant. Anthony Ricco also came there (A341).

On occasion he saw them go to the bathroom at that bar (A342). However he heard no conversations between them (A343). Rossi finally stopped attending (A344). However Rizzieri continued to patronize the bar meeting the Riccos and the appellant there (A344). Later Angelo Ricco and a Ricky Baronti invested

$8,000 in the bar (A345, A346). After Rizzieri was arrested the appellant and the Riccos did not go to the bar (A345).

However business dropped off at the bar and Mengrone told Anthony Ricco that he couldn't pay the debt he owed (A353). Thereupon, he offered to sell narcotics for Ricco (A353, A354). He then let it be known to others that he was in the position to sell narcotics (A354). In June 1973 he spoke to Pearson, one Anthony Zinzi, Nick Visciglia, and Frank Lucas about narcotic sales (A355).

Pearson offered to be a supplier (A355, A356).

In June 1973 Pearson told Mengrone that he could supply heroin and cocaine to him (A356). Then Visciglia told him that he had a customer (A356). Mengrone met with Anthony Ricco and told him of the Pearson and Visciglia proposal (A358, A359). According to Mengrone, Anthony Ricco entered into an arrangement whereby Visciglia would get adulterated cocaine and the proceeds of that sale would be used to buy narcotics from Pearson (A359). Thereafter Mengrone told Pearson he would make a purchase from him (A357, A358). He then told Visciglia he would give him a sample at the "Magic Carpet" (A358). There the witness met Anthony Ricco who told him to go to his brother Angelo to get a sample. He did so (A358, A359). Visciglia approved the sample and told Mengrone that he was then going to get the purchase price (A361).

Pearson and DiSalvo next met him to receive the purchase price (A361, A362). Eventually the transaction fell through (A362).

It appeared that Visciglia didn't complete the transfer because Pearson ultimately was to sell the very narcotics to Mengrone and Ricco. This was characterized as a "double jerk" (A364).

Later this witness met a James Venia, a usurer in July 1973 (A364). Venia had a supply of six kilos of heroin that he wanted to sell for $40,000 (A365). Mengrone met the Riccos, explained the proposal, but was told to buy that quantity at $35,000 (A366). Venia when told of this, agreed to the price (A366). Mengrone then got $35,000 from Angelo Ricco, kept $2,000 of it for himself and gave Venio the net balance of $33,000 (A368). Venia told Mengrone to wait for the delivery of the narcotics (A369). When the Riccos were told of this they criticized him for not getting the narcotics when he made the payment to Venia (A370, A372). The witness told Anthony Ricco then about kidnapping a child of Venia in order to get the money, but Anthony Ricco disapproved (A372).

Mengrone then related of an aborted deal with a Frank Lucas. This transaction fell through because Anthony Ricco wanted no deliveries to be made in Harlem (A375, A376).

Seeking to give evidentiary support to overt act number 21, alleged in the conspiracy count of the indictment, it was elicited that Mengrone was attempting to deal with Lucas. In the early part of October 1973 Mengrone was to give a sample of the narcotics to Lucas (A377). The witness waited in his automobile in front of the "Magic Carpet" for Anthony Ricco to give him the sample (A377). The appellant emerged from the bar and greeted him, the witness telling the appellant that he was waiting for Anthony Ricco, that he had a "big deal" (A378). The appellant told Mengrone that he was also waiting for "Tony", that he had something big, and that he, the appellant, was in the "middle of a big deal" and that he needed the sample (A378).

The appellant then re-entered the bar (A378). Meanwhile a nephew of Anthony Ricco named "Sally" appeared and told the witness that he had two customers (A378, A379).

Ultimately Anthony Ricco appeared and gave Mengrone the sample to be delivered to Lucas, telling Mengrone to tell Lucas to deal directly with him (A379, A380). The appellant appeared and announced to Anthony Ricco that he was present and Anthony Ricco left the witness and went into the bar with the appellant (A379).

## POINT I:

## THE PROOF AT TRIAL SHOWED THAT THERE WAS MORE THAN ONE CONSPIRACY:

Counsel has set forth the salient facts underlying this case to show the miriad and sordid transactions engaged in by the Government's witnesses Rossi, Pearson and Mengrone, so as to provide a complete background to the argument herein.

Recently in U.S. v. Sperling, 506 F. 2d 1323 (Cir. 2d, 1974) cert. den. 95 S. Ct. 1351, this Court advised the Government to desist from grouping in an alleged overall conspiracy criminal acts that were loosely connected or not even connected. On pages 1340-1341 it was stated in part as follows:

> "In view of the frequency with which the single conspiracy vs. multiple conspiracies claim is being raised on appeals before this Court..., we take this occasion to caution the government with respect to future prosecutions that it may be unnecessarily exposing itself to reversal by continuing the indictment format reflected in this case. While it is obviously impractical and inefficient for the government to try conspiracy cases one defendant at a time, it has become all too common for the government to bring indictments against a dozen or more defendants and endeavor to force as many of them as possible to trial in the same proceeding on the claim of a single conspiracy when the criminal acts could be more reasonably regarded as two or more conspiracies, perhaps with a link at the top. Little time was saved by the government having prosecuted the offenses herein involved in one rather than two conspiracy trials. On the contrary, many serious problems were created at the trial level, including the inevitable debate about the single conspiracy charge, which can prove seriously detrimental to the government itself. We have already alluded to our problems at the Appellate level, where we have had to comb through a

voluminous record to give adequate consideration to the claims of eleven separate appellants." (Emphasis supplied, internal quotations and citations omitted).

It is submitted that if it is difficult and burdensome for an Appellate Court to "comb the record" to ascertain whether there is one overall conspiracy, it's practically impossible for a jury of laymen to do the same with the added conceptual difficulty that laymen may have.

In this case there were ten defendants and three unindicted co-conspirators who were named, coupled with other co-conspirators unknown to the grand jury

The separate conspiracies involved here extended to Rizzieri who allegedly continued the narcotic business after Rossi stopped dealing with the Ricco brothers as well as Rizzieri. Yet Ferrarone the agent who testified for the Government, stated that Rizzieri told him that his source died out (this would be the Riccos) or that he had difficulties with his source and dealt with others (A272, A273, A274).

Pearson, who was dealing with DiSalvo, testified that "Rubin" may have been a supplier to DiSalvo and Pearson access(A293).

In this case, INDIVIGLIA's role, if he had one, was at a minimum. To put INDIVIGLIA on trial with the others involving lurid transactions such as Mengrone threatening to kidnap the child of a defaulting buyer, with Rossi cheating Lucas, with DiSalvo making threats to agents incognito at the New Jersey affair, and a party at this meeting displaying a gun with DiSalvo threatening violence to a disguised agent, denied the appellant

a fair trial and due process of law under the 5th Amendment to the Federal Constitution. We also mention the fact that in the first count charging conspiray overt act number 21 alleged that in September 1973 the appellant purchased a quarter of a kilogram of heroin from Anthony Ricco. Thus the Government itself theorized that the appellant was a purchaser and that the Riccos were the sellers. In U.S. v. Borelli, 336 F. 2d 376, (Cir. 2d, 1974), a case before this Court and cited in numerous cases before this Court, it was held that a "conspiracy" is essentially an agreement and that the factual problem was what did the accused agree to. In other words, notwithstanding that conspiracy is a group crime, this Court took the approach that the guilt of the defendant is individual and that the essential question involved a unilateral approach in order to fasten liability upon an accused. It is submitted that the Borelli holding means that it is not what the other parties may have agreed upon or what the master agreement was, or what the other parties intended when they entered the agreement, but what the particular accused, such as INDIVIGLIO in this case, agreed to and what penal consequences and liability the accused assumed.

See "The Unnecessary Crime of Conspiracy", 61 California Law Review, September 1973, page 1137, et seq. On pages 1148 and 1149 the author wrote as follows:

> "...Model Penal Code. Defines conspiracy in terms of one person agreeing with another, rather than two or more persons entering into an agreement. This semantic change was intended among other things, to make it possible to find each of the members of a criminal enterprise guilty of a different conspiracy, depending upon what he individually agreed to..."

On page 1150 of that article it was stated that:

> "...A far better way to determine the scope of one's individual liability for the conduct of another would be to abandon conspiracy altogether with its notions of business enterprises and general partnerships, and look instead to the policy underlying the specific prohibitions at issue..."
>
> "...But these elementary propositions of business economics have nothing to do with the criminal culpability. Absent the confusing concepts that conspiracy introduces, the courts probably would not even consider holding each participant for the crimes of the entire enterprise."

Even in this case, and taking recourse to the latter statement in the above quotation, it will be noted that all the defendants were joined in a conspiracy count but not in the other substantive counts. As a matter of fact the Court in its charge to the jury did not give a charge under Pinkerton v. U.S., 328 U.S. 640; see also the colloquy at page A415 of the Appendix.

As was noted in 72 Harvard Law Review, at page 922, et seq. "Developments in the Law of Criminal Conspiracy" (1959) at page 928:

> "Courts generally consider that a person who joins in an existing criminal group becomes a party to the same conspiracy. But if a conspiracy consists of a continuing act of agreement, it is difficult to see how that can be so, since the act of agreement in which an individual participates cannot logically begin before he enters or continues after he leaves. In reaching their conclusion therefore, Courts seem to be using the word conspiracy to refer not to a crime which by definition must be an act, but rather to a group..."

The fact that there were numerous narcotic transactions and that Rossi and Rizzieri bought from the Riccos or Mengrone was an outlet for the Riccos did not make this an overall conspiracy.

In U.S. v. Bertolotti, 529 F. 2d 149 (Cir. 2d, 1975) this Court stated on page 154 that the Government cannot resist the claim of multiple conspiracies in an indictment charging one conspiracy because the destination of the narcotics was the ultimate users, at page 154.

Bertolotti recognized, at page 154, that:

> "When convictions have been obtained on the theory that all defendants were members of a single conspiracy although, in fact, the proof disclosed multiple conspiracies, the error of variance has been committed..."

At page 155 continuing in this area, this Court in part stated that:

> "Since the indictment charges one overall conspiracy and the proof shows a series of smaller ones, there has been a material variance..."

The ruling in Bertolotti, supra, then explored the resulting prejudice from showing more than one conspiracy in an indictment charging an overall conspiracy. Thus it was practically "conceded" that there was a possibility of prejudice resulting from the number of defendants tried and the number of conspiracies proved (at page 156).

It was noted on page 156 in Bertolotti that:

> "While defendants are easily counted, conspiracies are less readily computable..."

In view of the sordidness of the transactions, the multiple defendants, the unindicted parties to the "conspiracy" prejudice flowed from the joinder of the appellant with the other defendants in this joint trial.

In regard to the defendant Blase, when moving for a judgment of acquittal, such motion was denied. However, the Court did give him some relief for it directed a severance of the case against him and directed a re-trial (A413, A414). In severing the case as to Blase, it is believed that the Court reasoned that while Blase operated with Rossi in the initial phase of the "conspiracy" the evidence of the subsequent events would have impaired his right to a fair trial. Yet the Court allowed the case to go to the jury as to INDIVIGLIA. Reduced to its essentials, the case against INDIVIGLIA was Rossi's vague testimony. Thus Rossi thought that the appellant was present at a meeting with the Riccos (A66, A92). His testimony revealed that

he "found out" that certain narcotics belonged to the appellant (A99). That he never "fully" transacted with the appellant (A100).

It will be further recalled that when he was confronted by statements be apparently gave to the authorities when he was cooperating, he didn't recollect referring to INDIVIGLIA.

As stated in U.S. v. Borelli, supra, 336 F. 2d 376, at page 384 that it is a "considerable over-simplification" to view the evidence showing that some defendants were parties to the agreement as a basis for holding a participation by other defendants who may have agreed with the others at any time for any purpose.

Joinder of defendants and counts in a single indictment followed by a single trial is governed by Rules 8 and 14 of the Rules of Criminal Procedure. Coupled with that is prosecutorial discretion, subject only to the limitations found in Rules 8 and 14 of the Rules of Criminal Procedure. The practically unbridled discretion of a prosecutor in framing an indictment, as the one before this Court, allows him to present to the trial jury such massive detail that individual jury consideration of an individual defendant's innocence is all but impaired. That juries may not always be able to follow instructions is a recognized fact in life. See Bruton v. U.S., 391 U.S. 123 (1968).

It is put that the issue herein has arisen because of the loosely controlled discretion enjoyed by a prosecutor subject to court control usually after a conviction has been obtained.

See "13 the American Criminal Law Review (Winter 1976) A Symposium Prosecutorial Discretion" at pages 490 et seq. It was noted on page 490 that:

> "As attention has focused on the decision making power of the prosecutor a once almost solitary plea for controls has grown into substantial support for an administrative law to regulate pre-trial prosecutorial procedures..."

The failure of the Court below to accord the same relief the Court gave to Blase affected the consideration of the defendant's liability under the substantive count, count two of the indictment. This count rested on Rossi's testimony. The jury heard that Rossi, who had numerous interviews with the government authorities, couldn't recall those interviews. Of course the thrust of the questioning in this regard was that Rossi did not ever refer to the defendant (A156, A158, A163, A165, A175, A177, A179). Rossi further stated before the trial that prior to January 1973 he didn't deal in narcotics or cocaine (A182, A183). The second count, joining the appellant with Angelo Ricco, referred to a cocaine transaction in August 1972.

This Court is respectfully importuned to deduct all the other hearsay, unrelated transactions involving the named defendants, the named co-conspirators but unindicted, and the others, from the record, and consider the case against this appellant so isolated. The two main witnesses against this appellant would be Rossi and Mengrone. Rossi's background, career, inconsistent statements, pre-trial silence, have all been considered. The only other evidence against this defendant involves the testimony of Mengrone who testified in support of overt act 21 in the

indictment. Yet Mengrone's testimony did not support that allegation (A378, A379).

The appellant's defense would have been more effective in presenting all the issues before the jury if he were tried separately and not subjected to all the details this trial involved.

The appellant's argument is based on the fact that the Court apparently was motivated to sever as to Blase because his role was at a minimum. It is difficult to see how the appellant's role was different from Blase's role. It is submitted that the Court by not according the same relief to the appellant as it did to Blase, denied the appellant equal protection of the law. It is put that equal protection of the law is a concept embodied in the due process portion of the 5th Amendment to the Federal Constitution. See Bolling v. Sharpe, 347 U.S. 497 (1954). In U.S. v. Papadakis, 510 F.2d 287, 300, (Civ. 2d 1975) at page 300 it was held that during trial, the court can direct a severance if there is prejudice at trial.

## POINT II

### THE SUMMATION BY THE GOVERNMENT ATTORNEY EXCEEDED THE BOUNDS OF FAIR COMMENT

The rebuttal of the last closing argument of the government attorney he referred to the remuneration the government witnesses were getting. He told the jury in part that:

> "We say ...that they couldn't have gotten the money from their old associates any longer, somebody has to support these people while they are doing this work. ...We will do it because we need the testimony because they are the people who know, and that's why we do it; otherwise we couldn't put these cases together."

"I submit that every y we spent on Rossi and on Pearson is worth it. (A419).

Timely objection was taken and sustained.

While the Court thus sustained the objection the jury heard this remark. In these inflationary times, with high taxes and the like, the impact of this remark to the jury was ineradicable. This statement to the jury in the context of this case, namely the details of the crime, the numerous parties, the duration of the trial, the lurid incidents, and all the sordid circumstances rendered this trial unfair to the appellant. A narcotic case, it is suggested, is not just an ordinary criminal case. It carries with it to the jury the sense of a heinous crime. However the enormity of the crime only presented a challenge to the standard of fairness that must be accorded a defendant in any criminal action. It is further put that the more grotesque the evidentiary details of a crime, the more is required from a prosecutor to cooperate with the Court to insure an absolutely fair trial to an accused.

The lay jury was less impressed by the prosecutor with the cost of this prosecution incurred by the Government. The plain meaning of the prosecutor's summation was that the Government should receive a consideration or a return on its investment in this case, namely a conviction. In U.S. v. Burse, 531 F. 2d 1151 (Cir. 2d,)1151 at page 1154, it was stated in part that:

"This Court has repeatedly addressed itself to the problem of prosecutorial misbehavior in the form of inflammatory or insinuating questions and statements... We have consistently warned that such misconduct may constitute sufficient cause for reversal." (Internal citations omitted).

POINT III:

THE APPELLANT CHARLES INDIVIGLIA PURSUANT TO RULE 28(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, RESPECTFULLY ADOPTS ALL POINTS ADVANCED BY THE CO-APPELLANTS IN THIS CASE, INSOFAR AS THOSE POINTS ARE APPLICABLE TO THE APPELLANT'S APPEAL.

IV

CONCLUSION:

IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENT OF CONVICTION APPEALED FROM SHOULD BE REVERSED.

Respectfully submitted,

ARNOLD E. WALLACH
Attorney for Appellant
CHARLES INDIVIGLIA

Dated: June 16, 1976